IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No.: DA-10-0218

GREGORY S. HALL Plaintiff and Appellant vs. DON HALL d/b/a DON HALL BUILDERS, DONNA HALL d/b/a TOWN & COUNTRY PROPERTY MANAGEMENT AND REAL ESTATE, DEBRA CERNICK d/b/a DEBRA'S MONTANA COUNTRY REAL ESTATE also d/b/a MONTANA COUNTRY REAL ESTATE, and JOHN D. HEINLEIN Defendants and Appellees	)	**INITIAL BRIEF OF APPELLANT**

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II.

STATEMENT OF THE CASE

Greg Hall sued the Defendants in District Court in Lincoln County, Montana alleging constructive fraud, Intentional Fraud, Negligence and violation of the general obligation statute and Restatement (Second) of Torts §552 [see Amended Complaint]. After discovery was concluded, all Defendants except Don Hall filed Motions for Summary Judgment and Motions in Limine. Subsequent to a Pre-Trial Order being entered and Trial scheduled, the District Court vacated the Trial Date, granted the Motions in Limine (Appendix Tab 1) and granted the Motions for Summary Judgment (Appendix Tab 2). It is from these Orders that Greg Hall appeals.

III.

STATEMENT OF THE FACTS

Defendant John Heinlein owned a home located at 719 Idaho, Libby, Montana. (Heinlein Deposition page 11.) Heinlein originally acquired the home from his sister Defendant Debra Cernick and his parents. (Cernick Deposition page 10. Pre-Trial Order Agreed Fact 2.) In 2006 Heinlein decided to sell his home and listed it with his sister, Cernick who is a Realtor who inspected the home prior to listing it for sale. (Heinlein Deposition page 20.)

Heinlein told Cernick that the oil boiler furnace did not work and had been disconnected. (Heinlein Deposition page 21.), Cernick knew that the furnace had leaked water in the house and that the furnace had been disconnected. (Cernick Deposition page 33.) Despite this knowledge, Cernick represented and advertised the home as having "oil fuel" and "hot water heat." She also represented and advertised the home having "new windows" and was "ready to live in." (MLS Listing - Deposition Exhibit 4, attached hereto as Exhibit A.) Cernick representations and advertising were patently false and misleading.

Heinlein believes he saw the advertisement in the local newspaper. (Heinlein Deposition page 21), but did nothing to correct the false advertisement.

Defendant Realtor Donna Hall gave the "fact sheet" prepared by Cernick to Greg Hall and Cernick admits that the "fact sheet" stated that the home had oil heat when it did not. (Donna Hall Deposition page 17.)

Heinlein admits he had a water leak in the bedroom next to the furnace which he failed to disclose and that he heard water sounds prior to the listing and contacted the City of Libby. (Heinlein Deposition page 47.) Prior to Cernick listing the home for sale, Heinlein also told his sister Cernick that sewage had backed up in the basement of the home. (Heinlein Deposition page 30.) She knew the sewer had backed up, there was a plug put in the line and somebody had roto-rootered the line. (Cernick Deposition page 35.) Neither Heinlein or Cernick disclosed these facts to Greg Hall. (Heinlein Deposition page 29.)

Greg Hall had never owned a home in his life. He purchased Heinlein's house through Realtors Cernick and Donna Hall. It was the first home he has ever owned. (Greg Hall Deposition page 113.) The home was represented by Cernick, Heinlein and Donna Hall as being in "good condition" and having oil heat. (Greg Hall Deposition page 172, 173).

When considering the purchase, Greg Hall had told realtor Donna Hall (no relationship) that because of his respiratory and health issues he did not want to be around mold. (Greg Hall Deposition page 117-118.) Because of health problems, Greg Hall was looking for a one-level home within a short distance of both downtown and the shopping center in Libby, Montana. He purchased the Heinlein residence because of its location. He had a partial amputation of the toes and the side of his foot and needed a home which would be accessible because he expected to be in a wheelchair. (Greg Hall Deposition pages 81, 115-116, 172). Along with the above undisclosed items, the Heinlein house also had Stachybotrys and Aspergillus mold in it, asbestos, a leaking water service line, nonfunctional sewer service, noncode compliant electrical work, and negative drainage Scott Curry Deposition pages 28-29 and Scott Curry Supplemental Affidavit, Exhibit E).

Greg Hall would never have brought the home had he been told the oil furnace did not work or had he known of the other defects. (Greg Hall deposition page 149.)

IV.

SUMMARY OF ARGUMENT

The District Court abused its discretion in granting the Motions in Limine other than as to Liability Insurance references and reference to the filing of Motions in Limine. The District Court should not have excluded testimony of Plaintiff's expert Scott Curry as to presence of vermiculite, the presence of mold, mold related issues including abatement costs and real estate standards of care because he clearly demonstrated that he met the requirements of knowledge, skill and/or training as to each issue to be able to give expert or skilled testimony as each issue. The District Court similarly erred in excluding evidence of Plaintiff's medical condition and the effect of mold on him. Montana law allows persons other than physicians to testify about medical conditions and causation.

The District Court erred in granting all motions for summary judgment. Summary judgment cannot be properly entered where there remain justiciable issues of fact. In this case the District Court has improperly bootstrapped its rulings on the Motions in Limine into a summary judgment. This was improper for two reasons. First, as set forth above, the Motions in Limine were improvidently granted. The District Court applied improper legal standards in granting the Motions. State v.

Fuller (Mont. 1996), 276 Mont. 155, 915 P.2d 809, 811, 53 Mont. St. Rep. 325, 326

Second, even if the Motions in Limine were correctly granted, there remained genuine issues of material fact as to the balance of Plaintiff's damage claims. *Brohman v. State of Montana, (1988),* 230 Mont. 198, 749 P.2d 67.

V.

STANDARD OF REVIEW

1) As to Whether the District Court Erred in Granting the Defendants' Motions in Limine;

On Motions in Limine, as to the Supreme Court reviews the District Court's legal rulings de novo. As to the balance of the ruling, the standard is abuse of discretion. State v. Fuller (Mont. 1996), 276 Mont. 155, 915 P.2d 809, 811, 53 Mont. St. Rep. 325, 326.

2) Whether the District Court Erred in Granting the Defendants' Motions for Summary Judgment

On Summary Judgment, the applicable standard of review is de novo. Summary Judgment is ***not proper*** where there are disputed issues of fact. *Brohman v. State of Montana, (1988),* 230 Mont. 198, 749 P.2d 67.

Summary judgment is not to be used to deny parties their right to try their cases before a jury, *Brohman, supra.*

VI.

ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING THE MOTIONS IN LIMINE

All Defendants except Don Hall filed Motions in Limine. The Defendant Debra Cernick filed a Motion in Limine seeking the preclusion of testimony and argument on the following issues:

1. That mold at the subject property is "toxic," and presents a health risk to Mr. Hall, caused personal injury, or required him to abandon the home;
2. That (Hall) is entitled to "loss of use" of damages associated with abandonment of the property;
3. That indoor air quality is substandard or poor;
4. Regarding mold abatement or remediation costs and damages of the property;
5. That any mold exists at the property beyond the three areas previously tested by Mr. Hall's civil engineer;
6. Regarding professional real estate standards of care.

The Defendant Donna Hall filed a Notice of Joinder in the Cernick Motion in Limine and in the Brief submitted by Cernick on:

1. Precluding testimony on any mold found at the Plaintiff's home is "toxic" or dangerous caused physical injury or required he abandon the property. (Cernick Motion in Limine #1.)
2. Preclusion of testimony by Scott Curry regarding mold amounts, abatement costs and real estate standards of care. (Cernick Motion in Limine #4, 5, 6.)

In addition, Donna Hall filed additional Motions in Limine seeking:

1. Exclusion of Liability Insurance;
2. Asbestos in the Subject Dwelling;
3. Reference to the filings of the Motion in Limine.

Defendant Heinlein filed a Motion in Limine seeking to exclude testimony:

1. That mold at the subject property is "toxic", presents a health risk to Mr. Hall, caused personal injury, or required him to abandon the home. (Similar to but not the same as Cernick Motion in Limine #1).
2. That Hall is entitled to "loss of use" damages associated with abandonment of the property. (Cernick Motion in Limine #2.)

3. That indoor air quality is substandard or poor; (Cernick Motion in Limine #3.)

4. Regarding mold abatement or remediation costs and damages to the property; (Cernick Motion in Limine #4.)

5. That any mold exists at the property beyond the three areas previously tested by Mr. Hall's civil engineer; (Cernick Motion in Limine #5.)

6. Regarding professional real estate standards of care; (Cernick Motion #6.)

7. Insurance coverage; (Donna Hall Motion #1.)

8. The existence of asbestos in the subject property; (Donna Hall Motion #2).

9. Reference to motions in Limine. (Donna Hall Motion #3).

The "Memorandum" attached to the Heinlein Motion has no supporting legal authority and refers to the brief submitted by Cernick and Hall.

The central theme of all of the Motions in Limine is an attack on the qualifications of Scott A. Curry. Mr. Curry, is a professional engineer and licensed contractor. The Supplemental Affidavit of Scott Curry goes into significant detail about his education, background, training and expertise. Mr. Curry was previously found to be qualified to give expert and skilled

testimony regarding mold issues in other Montana District Court Cases. Tracy Axelberg (Donna Hall's counsel in this case) was the mediator in two cases of the cases in which Mr. Curry has given expert opinion pertaining to mold. Mr. Axelberg realized that he was qualified to provide expert opinion regarding mold related damages.

In one case, Judge C.B. McNeil was the District Judge who found Curry to be qualified (Supplemental Affidavit of Scott Curry, Exhibit 1, Item 01-10, Morris Case). The following is a sampling of testimony of Curry that the Defendants sought to exclude:

- There was obvious fungal grown during the inspection of the home. (Curry Deposition p. 28.)
- The fungal grown has been identified as Stachybotrys and Aspergillus as a result of long-term exposure to moisture. (Curry Deposition p. 29.)
- The exterior of the home showed a brown discoloration under the siding just opposite the dishwasher. (Curry Deposition p. 32.)
- He has had training and experience to recognize fungal growth (Curry Deposition p. 35.)
- Everybody responds differently to mold. (Curry Deposition p. 44.)

- There is mold (Stachybotrys and Aspergillus on two levels at opposite ends of the home from a visible fungal growth and suspected other potential areas of fungal growth in walls and ceilings that are concealed by finish materials that contain piping that's been reported to have leaked. Knowing that there is visible fungal growth that tests out as two species at opposite ends of both floors, he ascertained that there was at least cross-contamination of the living spaces and a need for abatement, including correction of the source of moisture. A follow-up of the disinfection and/or removal and replacement of the materials that are affected with the fungal grown was also indicated. SOMETHING NEEDS TO BE DONE ABOUT IT TO REMOVE THOSE PARTICULAR TYPES OF TOXIC MOLDS THAT ARE SHOWING UP FROM THAT INDOOR AIR. (Curry deposition pages 45-46.)
- Curry believes that the expert retained by the Defendants recommendations are superficial based upon Curry's own experience. (Curry deposition pages 50-51.)

- The indoor air samples taken by the Defendants' expert were taken improperly with the doors wide open. (Curry deposition pages 54-56.)
- Curry sent his samples to the Montana Environment Lab for an evaluation. (Curry deposition page 58.) Based upon the results, Curry told Hall that the materials had been wet for a long enough time to create a growth that might be degrading in his indoor quality. (Curry Deposition p. 59.)
- Curry told Hall that the mold required immediate remediation and that he would not live in a house with visible fungal growth and Stachybotrys and Aspergillus present. The cause of the problem, moisture needed to be addressed and aggressive treatment taken for reliably safe indoor air quality. (Curry Deposition page 60.)
- Curry advised Hall not to live in the home as long as he had visible fungal growth that was identified as Stachybotrys based upon his experience and knowledge(Curry Deposition pages 64-65.)
- Greg Hall did not spend additional money for further testing because it wasn't necessary to initiate a fix. There were visible

colonies and continued sources of moisture (Curry Deposition page 76.)

- **EPA GUIDELINES STATE THAT A PERSON SHOULD NOT LIVE IN A STACHYBOTRYS-CONTAMINATED AREA.** (Curry deposition page 82.).
- An open container of vermiculite was discovered in the attic during the Curry inspection. (Curry deposition page 113.)
- The vermiculite was reported to the EPA and the EPA apparently removed the vermiculite (Scott Curry Deposition page 113-114.)
- The primary reason why Hall vacated the premises was not because of the mold. The primary reason was that there was no reliable water or sewer on the property. (Curry Deposition page 119.) This together with mold caused him to vacate the property (Curry Deposition page 123.)

A.2 The District Court Erred in Excluding Testimony on Asbestos

The District Court excluded testimony that asbestos existed in the home relying upon Curry deposition testimony that he would not be testifying at trial that there is vermiculite in the Plaintiff's attic. That is a distortion of the testimony. Curry testified the vermiculite (which is commonly known to contain asbestos) had been removed by the EPA.

Therefore logically, he would not have testified that the vermiculite was presently in the home, rather he would testify that at the time of his inspection vermiculite was present in the home. The District Court misapprehended the testimony and abused its discretion in excluding it.

A.3 The District Court Erred in Excluding Curry Testimony Concerning the Mold Issues and Excluding Medical Testimony Related Thereto

Curry states that the mold in Greg Hall's home is toxic to humans. It is well documented through science that an individual's intensity and duration of exposure to Stachybotrys and Aspergillus molds have been related to illness. Among evidence regularly relied upon by experts in Curry's field are a number of case studies recently published. Curry identified one involving an infant with pulmonary hemorrhage in Kansas, reported significant elevated cell counts of Aspergillus and Penicillium in the child's bedroom and in the attic of the home. Stachybotrys spores were also found in the air of the bedroom, and the source of the spores tested highly toxigenic. Of particular concern is the threat that humans will inhale and ingest these toxic spores. Therefore a health risk can exist to persons inhaling and ingesting these toxic spores in their home. Airborne Aspergillus and Stachybotrys mold spores have been identified in the Greg

Hall residence. Scott Curry's Supplemental Affidavit includes five publications explaining the dangers of living with this toxic mold. Bleach (a common mold remediation product) often does not kill Stachybotrys entirely when directly applied to it. Cosmetic ventures will do absolutely nothing but cover up the dilemma and complicate problems with liability and health issues later. One spore found in an air sample is the equivalent of finding thousands due to the difficulties in detecting airborne Stachybotrys spores. The presence of airborne spores means that Stachybotrys is colonizing in very high numbers, and as one might say; a lost cause. (Scott Curry Supplemental Affidavit.)

The record in front of the District Court, including the affidavits and the depositions clearly reflect that Curry is qualified to provide testimony that the mold is toxic, and that it was not safe for Greg Hall to remain on the property. Curry is qualified to provide testimony pertaining to the dangers of the toxic molds. Based upon his education, experience and training, Curry can identify the health risks a member of the public may experience from the exposure to the toxic mold. Greg Hall can testify regarding his health and what health related issues he was experiencing while living in the mold infested home.

In *State v. Sandrock*, (2004) *2004 MT 195, 322 Mont. 231, 95 P.3d 153*, The Montana State Supreme Court permitted a social worker's expert testimony regarding cult behaviors, such as sexual abuse and religious manipulation and control because the court found that the social worker did not testify that defendant was a cult leader or had formed a cult. By reference to her experiences in a Christian sect, the social worker merely provided the jury a context for them to understand the intricacies of religious groups in general. In that respect, the testimony was relevant.

Similarly, Mr. Curry can testify regarding toxic mold and its symptoms.

In fact, Mr. Curry under Montana law is also permitted to testify that the mold in the home was a causation of Mr. Hall's health problems. He is a professional engineer licensed in the State of Montana and Oregon (see Curry resume, Exhibit 1 to Supplemental Affidavit of Scott Curry). Professional engineers are by definition experienced and trained in such matters. See §37-67-101 MCA and §37-67-306 MCA.

§37-67-101 MCA in material part provides:

> **37-67-101. Definitions.** As used in this chapter, the following definitions apply:
> (1) "Board" means the board of professional engineers and professional land surveyors provided for in 2-15-1763.
> ********

(6) (a) "Practice of engineering" means:

(i) any service or creative work the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical, and engineering sciences to the services or creative work as consultation, investigation, evaluation, planning and design of engineering works and systems, planning the use of water, teaching of advanced engineering subjects, engineering surveys, and the inspection of construction for the purpose of ensuring compliance with drawings and specifications;

(ii) any of the functions described in subsection (6)(a)(i) that embrace the services or work, either public or private, in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, projects, and industrial or consumer products or equipment of mechanical, electrical, hydraulic, pneumatic, or thermal nature insofar as they involve safeguarding life, health, or property.

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§37-67-306 MCA in material part provides:

37-67-306. Qualifications of applicant for licensure as professional engineer. The following is considered minimum evidence satisfactory to the board that the applicant is qualified for licensure as a professional engineer:

(1) A graduate of an engineering or engineering technology curriculum of 4 years or more approved by the board as being of satisfactory standing, with a specific record of an additional 4 years or more of progressive experience on engineering projects under the direct supervision of a professional engineer, unless exempt under 37-67-320(2), and who has passed examinations of a grade and character that indicate to the board that the applicant may be competent to practice engineering, must be admitted to an 8-hour written examination in the fundamentals of engineering and an 8-hour written examination in the principles and practices of engineering. Upon passing the examinations, the applicant must be granted a license to practice engineering in this state if the applicant is otherwise

qualified.

(2) A graduate of a related science curriculum of 4 years or more, other than engineering or engineering technology, with a specific record of 8 years or more of progressive experience on engineering projects of a grade and character that indicate to the board that the applicant may be competent to practice engineering, may be admitted to an 8-hour written examination in the fundamentals of engineering and an 8-hour written examination in the principles and practices of engineering. Upon passing the examinations, the applicant must be granted a license to practice engineering in this state if the applicant is otherwise qualified.

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Curry's training and experience is far beyond that required for licensure (see Supplemental Affidavit of Scott Curry and Exhibit 1 thereto.

Scott Curry is entitled to testify that mold was found, what caused it, that the mold is toxic and that is considered unsafe for many individuals to live with the mold he found. His expertise is established by his Affidavit and Supplemental Affidavit. He has training including four years of college and nineteen years of experience. He can say the information he relied upon is the type of information regularly relied upon by experts in his field. See following Montana Rules of Evidence, 702-704:

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Rule 703. Basis of opinion testimony by experts. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704. Opinions on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Medical training is not necessary to give opinion testimony relating to medical symptoms if the witness has training and experience to support the claimed expertise. In *State v. Gregoroff*, 287 Mont. 1, 4-7, 951 P.2d 578, 580-82 (1997) the Montana Supreme Court held that police officers can give opinion testimony on the issue of whether a driver was under the influence of alcohol [as well as whether that caused an accident] due to their training and experience. In *State v. Ditton,* 2006 MT 235; 333 Mont. 483; 144 P.3d 783, officers who could not distinguish between a driver-diabetic's medical symptoms and alcohol intoxication were allowed to give opinion testimony and the Montana Supreme Court expanded the *Gregoroff* ruling to say:

> When the proper foundation has been laid, this Court has allowed a law enforcement officer to testify as an expert regarding the cause of an accident and whether the driver had been driving under the influence of alcohol. *State v. Gregoroff*, 287 Mont. 1, 4-7, 951 P.2d 578, 580-82 (1997). We allow such **testimony** because of the officer's extensive training and experience. *Gregoroff*, 287 Mont. at 4-7, 951 P.2d at 580-82. In the present case, the State laid a foundation that both Munter and Dahle had extensive training and experience in DUI investigation and Dahle had training and experience in accident investigation. Thus, the Municipal Court properly allowed them to express their opinions concerning the cause of the accident in question, and whether Ditton drove under the influence of alcohol. Ditton's contention that Munter and Dahle were not qualified to give their opinion because they could not distinguish between a diabetic's medical symptoms and alcohol intoxication is a matter for cross-examination attacking the weight of their testimony.

Interestingly, the *State v. Gregoroff* officers had 12 weeks of training and 8 years of experience in DUI arrests. This is drastically less training and experience in determining whether someone's symptoms indicate they are under the influence of alcohol, than Scott Curry has in this cause relating to mold issues.

Further, until Curry's testimony is offered at trial, it is improper for the District Court to rule in limine that no foundation exists and he is not qualified. The District Court should have awaited Curry's testimony at trial subject to voire dire by defense counsel if they so chose to conduct it to determine Curry's qualifications.

As to medical conditions, Greg Hall can testify to his symptoms which started when he moved into the house and ceased when he moved as reflected in at least two rules of evidence. See Rules 401 and 701, Montana Rules of Evidence.

Rule 401. Definition of relevant evidence.

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

Rule 701. Opinion testimony by lay witnesses.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

The commencement and abatement of symptoms with move in and move out clearly suggests that the house is the cause of the symptoms and makes it more probable than not that something in the house causes them. Common sense suggests that Greg Hall could not live in the house with the symptoms caused thereby. Scott Curry's testimony establishes likely cause for the symptoms, toxic mold. Greg Hall is allowed to testify as to his

opinion that the house and the mold is causing such severe symptoms that he cannot reasonably stay in the house. Rule 701, Montana Rules of Evidence.

In *Sherner v. Conoco,* (2001) Cause NO. DV-97-626 Thirteenth Judicial District, 2001 ML 1727 (Exhibit 1), Judge Fagg correctly ruled that lay witnesses may testify in the form of opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue. Rule 701, M.R.Evid. (2000). The issue included whether H2S existed in W-58, and appropriate lay testimony clarifying understanding of this fact should be admitted. The court held that lay witnesses, including Conoco's employees, may testify regarding their perceptions of the presence of H2S in W-58 if their testimony is based upon their own perceptions and helpful to a determination of this fact. *See, e.g., Cowles v. Sheeline*, 259 Mont. 1, 855 P.2d 93 (1993); *Hall v. Big Sky Lumber & Supply, Inc.*, 261 Mont. 328, 336, 863 P.2d 389, 394 (1993).

Mr. Hall's opinion that he could not stay in the house is rationally based upon his perception. He moves in, symptoms start. He moves out symptoms stop. Mr. Hall's opinions are helpful to a clear understanding of his testimony and to the determination of a fact in issue. The fact in issue is

whether he can stay in the house and his perception is that he cannot. Curry's expert testimony on the presence and effects of toxic mold support that opinion.

A.4 The District Court Erred in Excluding Curry's Testimony Regarding Mold, Abatement Costs, and Real Estate Standards of Care

Mr. Curry certainly can testify regarding indoor quality, mold amounts and existence of mold beyond the areas which have been colony infestations together with the cost of mold containment. Although Mr. Curry does not actually take indoor air quality samples, based upon his education, training and expertise he has the ability to interpret the results which come from the laboratory. Obviously a doctor does not take his own x-rays of a patient. But a doctor has the ability based upon his education, training and experience to read an x-ray. It is nonsensical for the Defendants to claim Mr. Curry cannot interpret the results of an indoor air quality sample. Based upon his impressive qualifications, Mr. Curry certainly can testify on that issue.

Similarly Curry can testify on mold abatement and the costs of abatement. He is a licensed contractor. He is a professional engineer. He has made many "estimates" in his career of the costs to repair or remediate or build. The Cernick brief claims Curry testified his "estimate is entirely

speculative." (Cernick brief page 14.) That statement was taken out of context. Disassembly of some of the walls are required to determine the extent of the mold damage. (Curry Deposition page 45-46, 49, 51, 52.)

Curry can give an opinion regarding the mold and air quality and that it is his opinion that it is more than likely based upon his education, experience and training that mold exists in more than three areas. He was asked that question during the deposition. (Curry Deposition pages 45-46.)

A.5 Curry is Qualified Regarding Real Estate Standards of Care

Curry is qualified to provide testimony regarding the duties of a realtor. He has during the past twelve years alone in addition to his construction and engineering professions has bought, sold and consulted with people who have brought and sold properties. He has dealt with numerous realtors on behalf of the six properties he himself has purchased plus doing consulting work for other individuals pertaining to realtors and transactions involving the buying and selling of property. (Curry Deposition pages 93-96 and Supplemental Affidavit of Curry.)

Curry is familiar with the standards of practice of Buyers, Sellers and their Brokers. It is his opinion, in such transactions, Buyers, Sellers and their Brokers routinely require complete disclosures from each other with respect to all conditions at the property involved and that all Buyers and

Sellers initial each page of all disclosures and contract documents prior to final closing of each transaction. (Supplemental Affidavit of Curry.) (See Rules 702-704, Montana Rules of Evidence. Curry is qualified to provide the expert testimony regarding the standards of a realtor.

The District Court erred by granting Motions in Limine to exclude evidence of: asbestos in the house; that mold found at the house was toxic or dangerous, that the mold caused or contributed to medical conditions of which Greg Hall complained, and that the presence of mold caused or contributed to Greg Hall abandoning the premises; other mold related issues including without limitation, mold amounts at the house, what mold abatement would entail, and the costs of mold abatement; and real estate broker/agent standards of care.

B. THE SUMMARY JUDGMENT

B.2 THE DISTRICT COURT ERRED IN HOLDING THAT DONNA HALL HAD KNOWLEDGE TO BE IMPUTED TO GREG HALL

The District Court decided that summary judgment was proper on all claims because Greg Hall was charged with any knowledge that Donna Hall had that the oil furnace was inoperable because she was a Buyer's Agent and no genuine issue of fact existed as to whether Donna Hall had the

Seller's Disclosure that indicated the oil furnace was inoperable. The District Court's determination is factually incorrect. The remained a genuine issue of fact as to whether Donna Hall knew about the inoperable furnace. The following excerpts from Donna Hall's deposition transcript show that an issue of fact as to whether the page of the disclosure containing the furnace reference was in her possession before closing:

Pages 11 (lines 21-25), 12 (line 1)

Q. And then once you had that buy/sell written up,

what did you do with it?

A. After I had the buy/sell written up and whatever disclosures that I had with it, which were the ones that I marked, had him sign and do whatever, I took it over to Ms. Cernick's office.

Pages 59 (lines 22-25), 60 (lines 1-3)

Q. And as I understand it, you went back to get a full copy of the disclosure documents from Deb Cernick after closing?

A. Yes.

Donna Hall said she had Greg Hall sign the contract ".....and <u>whatever disclosures that I had</u> with it ...." She didn't keep a copy of what she had. She delivered it all to Debra Cernick. After the closing and Greg Hall's complaints she had to retrieve a copy of the Seller's Disclosures from the

listing agent, Cernick. At that time she got four sheets. BUT Mr. Hall is adamant that at contract signing he had only 3, the one dealing with the furnace being omitted [Greg Hall Deposition Transcript, page 97-99]. Thus, an issue of fact as whether Donna Hall had the disclosure concerning the furnace still existed.

The District Court also erroneously seized upon Greg Hall's statement that the furnace's condition as a deal breaker precluded any other items being a deal breaker. Greg Hall also stated had he known of even one or two of the things Scott Curry found, he would not have purchased the house [Greg Hall Deposition Transcript, pages 148-151]. Scott Curry found the water leaks, the sewage back-up, the plug in the basement drain, the mold, the vermiculite/asbestos, the electrical wiring not up to code, lack of usable water and sewer, and other items that were not disclosed in the Seller's Disclosures. Thus, it is apparent that even if Greg Hall knew about [or is charged with knowing about] the furnace condition, he still would not have purchased the house if he had known about these other issues.

Finally, if Donna Hall knew about all the deal breakers and that knowledge was properly imputed to Greg Hall, it would follow that Donna Hall was liable to Greg Hall if she failed to reveal these items to Greg Hall as Greg Hall asserts. Therefore, summary judgment could not possibly be

appropriate as to Donna Hall. To hold otherwise would lead to the absurd result that Donna Hall is not liable to her principal because she knew about adverse material facts and failed to tell her principal.

Accordingly, although a genuine issue of material fact exists as to whether Greg Hall or Donna knew about the furnace, even if one or both did, that does not preclude reliance by Greg Hall upon the failure of Heinlein and Cernick to disclose the water leaks, the sewage back-up, the plug in the basement drain, the mold, the vermiculite/asbestos, the electrical wiring not up to code and other items discovered by Scott Curry that were "deal breakers" for Greg Hall as well as the furnace.

B.3 DISTRICT COURT ERRONEOUSLY CONCLUDED THAT INTENTIONAL FRAUD HAD NOT BEEN PLEADED WITH SUFFICIENT PARTICULARITY

The District Court citing, *inter alia, C. Haydon Limited v. Montana Mining Properties, Inc.* (1993), 262 Mont. 321, 864 P.2d 1253, entered summary judgment on the intentional fraud count of the Amended Complaint [Count II – Amended Complaint] concluding that the elements of intentional fraud had not been plead and giving the elements as (1) a representation; (2) the falsity of the representation; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that it should be relied on; (6) the hearer's ignorance of the

falsity of the representation; (7) the hearer's reliance upon the representation; (8) the hearer's right to rely upon the representation; and (9) proximate injury caused by reliance on the representation. The District Court apparently overlooked the following language of the *C. Haydon Limited* opinion:

> [*325] HN1 We will not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Proto v. Missoula County* (1988), 230 Mont. 351, 352-53, 749 P.2d 1094, 1095-96. In considering Murray's motion to dismiss, we construe the complaint in the light most favorable to MMPI, and all allegations of fact are taken as true. See *Willson v. Taylor* (1981), 194 Mont. 123, 126, 634 P.2d 1180, 1182.

and incorrectly concluded these elements were not pleaded in the Amended Complaint. They were so pleaded as can be seen from the following analysis of the elements and the Amended Complaint's allegations:

(1) a representation; See paragraphs 7 and 8 of the Amended Complaint as follows:

Paragraph 7

> Prior to July 13, 2006 CERNICK listed the Property for sale and published written information in the listing for use by persons interested in buying real estate in Lincoln County, Montana AND for use by persons engaged in the business of selling real estate in Lincoln County, Montana to others. HEINLEIN saw the advertisement in the newspaper and may

have seen other advertising materials. The published information includes, but is not limited to, Exhibit 1 hereto, the MLS Listing Sheet.

Paragraph 8

The written listing [Exhibit 1] was false and misleading as to the condition of the property and its suitability for use as a residence. Among other things, the listing incorrectly listed oil heat as being in the property, and failed to disclose material defects and adverse conditions in and with respect to the Property. There were material defects and adverse conditions in and with respect to the Property including without limitation, the presence of vermiculite in the attic, that there had been at least one sanitary sewage back-up into the basement that had not been properly disinfected and cleaned, that plumbing back-ups had been severe enough to require "roto-rootering", that a plug had been inserted in the basement floor drain to block the drain, that City of Libby water department employees had advised HEINLEIN that there were leaks in the water service line between the water main and the property, that City of Libby water department employees had advised HEINLEIN that they could not locate the water shut-off for the water service line, that the water service line to the property passed under a structure on the adjacent lot, that the sewer line serving the property is encroached upon by structures on the adjacent property such that repair and replacement is impractical, many of electrical outlets are not properly grounded, that the front door exterior outlet is not a GFI circuit, garage electrical outlets are not properly grounded and only one is a GFI circuit and wiring to them must be replaced, that there were roof leaks, that there were leaks in the building including basement walls, that there were leaks in the plumbing, that there were leaks in the water service line serving water to the Property, that the oil fueled hot water heating system was inoperable, that there had been leaks in the oil fueled hot water heating system that placed water in walls and ceilings, that all windows were not new as suggested by the listing materials, that the dish washer plumbing leaked and operated improperly, that electric heating

systems were improperly located, that there were plugged plumbing and drains and adverse conditions, mold and toxic mold was present, and that efforts had been made to hide the defects and adverse conditions and avoid their discovery until after the Property was sold. Defendants knew, or exercise of reasonable care and diligence should have known of the foregoing material defects and adverse conditions in and with respect to the Property.

(2) the falsity of the representation; See paragraph 8 of the Amended Complaint set forth above.

(3) its materiality; See paragraph 8 of the Amended Complaint set forth above including the following language from that paragraph 8: *.....failed to disclose material defects and adverse conditions in and with respect to the Property. There were material defects and adverse conditions in and with respect to the Property including without limitation,.....*

(4) **the speaker's knowledge of its falsity or ignorance of its truth;** See paragraph13 of the Amended Complaint set forth above including the following language from that paragraphs 8 and 13:

.....Defendants knew, ..., of the material defects and adverse conditions listed in Paragraph 8 above prior to closing.....

(5) the speaker's intent that it should be relied on; The representations were made for the purpose of advertising and

selling them property at issue. See the following language from that paragraphs 7 and 9 of the Amended Complaint :

Paragraph 7

> Prior to July 13, 2006 CERNICK listed the Property for sale and published written information in the listing for use by persons interested in buying real estate in Lincoln County, Montana AND for use by persons engaged in the business of selling real estate in Lincoln County, Montana to others. HEINLEIN saw the advertisement in the newspaper and may have seen other advertising materials. The published information includes, but is not limited to, Exhibit 1 hereto, the MLS Listing Sheet.

Paragraph 9:

> In July, 2006 between July 13, and July 15, 2006 HEINLEIN as Seller, DONNA HALL as selling broker and DEBRA CERNICK as listing broker sold the Property to Plaintiff without disclosing the material defects and adverse conditions listed in Paragraph 8 above. Defendants failed to give Plaintiff HEINLEIN'S complete four page SELLER'S DISCLOSURE [Exhibit 2 hereto], instead giving him only three pages [Exhibit 3 hereto] of HEINLEIN'S complete four page SELLER'S DISCLOSURE. Also Defendants failed to give Plaintiff the Seller's MOLD DISCLOSURE [Exhibit 4].

Paragraph 10:

> HEINLEIN also failed to disclose the material defects and adverse conditions listed in Paragraph 8 above.

Paragraph 11:

> The sale closed on or about August 9, 2006. At no time prior to closing did any of the Defendants disclose the

material defects and adverse conditions listed in Paragraph 8 above.

Paragraph 12:

DONNA HALL and/or CERNICK coerced Plaintiff to have a home inspection done by DON HALL in an effort to avoid any discovery by, or disclosure to Plaintiff of the material defects and adverse conditions listed in Paragraph 8 above prior to closing. DON HALL inspected the Property prior to closing and advised Plaintiff of certain findings, but did not disclose the material defects and adverse conditions listed in Paragraph 8 above to Plaintiff.

(6) the hearer's ignorance of the falsity of the representation; In addition to the failure to disclose allegations cited previously, see the following language from that paragraph 15 of the Amended Complaint :

If the material defects and adverse conditions in and with respect to the Property listed in Paragraph 8 above had been disclosed, Plaintiff would not have purchased the Property.....

Obviously this alleges he did not know of the defects.

(7) the hearer's reliance upon the representation; In addition to the failure to disclose allegations cited previously, see the following language from that paragraph 15 of the Amended Complaint :

.....However, in reasonable and justifiable reliance upon the listing, the representations of the Defendants as to the condition of the Property and its suitability for use as a residence, and the failure of Defendants to disclose the defects and adverse conditions, Plaintiff purchased the Property and closed the sale.....

Greg Hall's reliance is clearly pleaded.

(8) the hearer's right to rely upon the representation; Greg Hall was a purchaser looking to Realtors and a Homeowners to disclose what they knew about homes for potential purchase. He has a right to rely upon what is said by the Realtors and Homeowners if his reliance is justifiable. He is not required to investigate ("Regardless, where a contract is induced by false representations as to material existent facts, which are made with the intent to deceive, and upon which the plaintiff relied, it is no defense that the party to whom the representations were made might, with due diligence, have discovered their falsity, and that he made no searching inquiry into the facts. *Durbin v. Ross* (1996), 276 Mont. 463, 470, 916 P.2d 758 (quoting *Lee v. Armstrong* (1990), 244 Mont. 289, 798 P.2d 84)") Greg Hall has alleged justifiable reliance in paragraph 15 of the Amended Complaint as follows:

..... in reasonable and justifiable reliance upon the listing, the representations of the Defendants as to the condition of

> the Property and its suitability for use as a residence, and the failure of Defendants to disclose the defects and adverse conditions, Plaintiff purchased the Property and closed the sale.....

In addition, where dealing with Realtors, §37-51-313(10) MCA provides that Realtors have statutory duties upon which a Buyer may rely. They include:

> "Consistent with the licensee's duties as a buyer agent, a seller agent, a dual agent, or a statutory broker, a licensee shall endeavor to ascertain all pertinent facts concerning each property in any transaction in which the licensee acts so that the licensee may fulfill the obligation to avoid error, exaggeration, misrepresentation or concealment of pertinent facts."

(9) proximate injury caused by reliance on the representation. See the following language from that paragraph 18 of the Amended Complaint :

> As a result of the foregoing Plaintiff has suffered damages, including, but not limited to the following:.....[List of Damages follows in subparagraphs A. Through N].

Accordingly, it is clear that the elements of intentional fraud have been alleged in Count II of the Amended Complaint. Fraud is always a question of fact. Fraud is complete where a seller knowingly suppresses a serious vice of his property which the vendee had no reason to suspect. *Russell v. Russell,* 152 Mont. 461, 452 P.2d 77(1969).

B.4 THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT MRELA PRECLUDES COMMON LAW ACTIONS

The District Court ruled that §37-51-313(1) replaces the common law as applied to the realtors and precludes former common law causes of action. However, the District Court overlooked the analysis of its sister Districtr Courts, *Newell v. Rabel*, Cause No. 98-316, Eleventh Judicial District Court of Montana (March 13, 2001) and *Cheeney v. Drummond* Cause No. DV-03-64, Twenty-First Judicial District (May 9, 2005). In N*ewell* Judge Salvagni resolved that §37-51-313 MCA did not extinguish the plaintiffs common law claims. He pointed out that while §37-51-313 MCA is a statutory expression of what previously may have been common law standards of conduct, the plain language of §37-51-313 MCA does not preclude the pursuit of common law claims for the violation of those now statutory standards.

In *Cheeney v. Drummond* Cause No. DV-03-64, Twenty-First Judicial District (May 9, 2005), District Court Judge Haynes also reviewed §37-51-313 MCA based upon common law and quite correctly noted that §37-51-313(10) provides:

> **"Consistent with the licensee's duties as a buyer agent, a seller agent, a dual agent, or a statutory broker, a licensee shall endeavor to ascertain all pertinent facts concerning each property in any transaction in which the licensee acts so that the licensee may fulfill the obligation to avoid error, exaggeration, misrepresentation or concealment of pertinent facts."**

It is also important to note that Rule 8(c) MT. R. Civ. P requires a defendant to raise any matter constituting an avoidance or affirmative defense. None of the Defendants did this, opting instead to make a last minute attack that MRELA preempts the common law in Montana. Of interest is that Greg Hall made a request to amend the pleadings to conform the pleadings to the evidence before the Motions for Summary Judgment were granted. Since there would have been no surprise and the facts which have been obtained through discovery simply are more cohesive then the original amended complaint. Therefore, the District Court should have allowed the amendment in any event.

B.5 THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT NO NEGLIGENCE ACTIONS EXISTED AGAINST DEBRA CERNICK AND DONNA HALL

The District Court erroneously concluded that no duty to Greg Hall existed on behalf of the Realtors Donna Hall and Cernick because Cernick did not represent Greg Hall basing its decision upon *Durbin v. Ross*, 276 Mont. 463, 472 P.2d 758 (1996). Addressing first the cause of action

against Donna Hall, it is apparent that the District Court failed to draw a distinction between Donna Hall who did represent Greg Hall and Debra Cernick who represented the seller Heinlein. Interestingly, the District Court in its Order Granting Defendants' Motions for Summary Judgment opined on page 5 that knowledge of Donna Hall was imputed to Greg Hall as she was ***"...Plaintiff Hall's buyer's agent",*** but then inconsistently finds Donna all has no duty to Greg Hall on pages 8 and 9 of the very same order. If on page 5 of the order the District Court find that Donna Hall was Greg Hall's Buyer's Agent, then it must follow that she represented him and *a fortiori* had a duty to him.

As to Debra Cernick, the record is replete with evidence that she is guilty of negligent misrepresentation. She advertised the home as having oil fuel and hot water heat, new windows and ready to live in (See Deposition Exhibit 4). None of that was true. She knew that there had been leaks, a sewage back-up, a drain rotor-rootered out and plugged, and that the oil heat did not work. She disclosed none of this. Therefore, she has liability to Greg Hall pursuant to *Durbin,* supra, which is right on point. The Durbins sued the real estate brokers with whom they had no professional relationship. The *Durbin* Court approved the cause of action and held that no expert testimony was necessary. In the instant case, the District Court mistakenly

relied upon *Romans v. Lusin*, 2000 MT 84, 299 Mont. 182, 997 P.2d 182 to hold that a expert testimony was required by a standard of care expert and since none was listed, summary judgment was proper on the negligence claims against the realtors, Donna Hall and Cernick (Pages 8 and 9 of Order Granting Defendants' Motions for Summary Judgment). This is directly contrary to the rule espoused by the Montana Supreme Court in *Durbin,* supra, as follows:

> A determination of whether the Realtors made a representation and whether that representation was false is clearly within the common knowledge of a layperson. In the instant case, scientific, technical, or other specialized knowledge is not necessary to assist the jury to understand the evidence because the statute and the regulations establish the conduct to which the Realtors must conform **[***25]** regardless of whether other brokers conform to that same conduct. **[*477]**

Further, *Romans* is distinguishable on its facts. Unlike the instant case, *Romans* was a ***medical malpractice case in which*** scientific, ***technical, or other specialized knowledge of medicine was necessary*** , not a Realtor negligence or negligent misrepresentation case. *Romans* is not applicable to the case at bar.

B.6 THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THERE WAS NO EVIDENCE THAT DEBRA CERNICK AND DONNA HALL HAD KNOWLEDGE BEYOND THE SELLER'S DISCLOSURE FORMS

The District Court stated that there was no evidence showing that either Donna Hall or Cernick had knowledge of defects beyond the Seller's Disclosure Forms (Page 10 of Order Granting Defendants' Motions for Summary Judgment). This is simply incorrect. Heinlein also told his sister Cernick that sewage had backed up in the basement of the home. (Heinlein Deposition page 30.) Cernick knew the sewer had backed up,that there was a plug put in the line and that somebody had roto-rootered the line. (Cernick Deposition page 35.) Neither Heinlein or Cernick disclosed these facts to Greg Hall. (Heinlein Deposition page 29.) These adverse material facts are not in either version of the Seller's Disclosures (Deposition Exhibits 4 and 8).

Further, the District Court's statement ignores a genuine issue of material fact as to when all pages of the Seller's Disclosures were given to whom. As set forth earlier in this brief, Donna Hall only gave Greg Hall "After I had the buy/sell written up and ***whatever disclosures that I had with it***, which were the ones that I marked, had him sign and do whatever, I took it over to Ms. Cernick's office (Donna Hall Deposition Transcript,

Pages 11 (lines 21-25), 12 (line 1)). Donna Hall did not keep a copy of the disclosures she had and showed Greg Hall, so she had to go back to Cernick after closing when the problems arose and ask for copies (Pages 59 (lines 22-25), 60 (lines 1-3)). At that time, Donna Hall was given all four pages, but Greg Hall had the original copy of the disclosures Donna Hall had and had given him when he entered the contract and the furnace disclosures were not part of those disclosures (Hall Deposition Transcript Pages 97-99; see also Affidavit of Plaintiff in Opposition to John Heinlein's Motion for Summary Judgment). Even if the furnace defect issues were in some version of Seller's Disclosures, a genuine issue of fact exists as to whether that version was in Donna Hall's hands until after closing when a problem had already occurred. It seems clear that significant evidence exists of record that neither Donna Hall or Greg Hall had the 4 page version of the Seller's Disclosure. The District Court was clearly wrong about the evidence of record.

B.7 DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THERE WAS NO EVIDENCE ESTABLISHING HOMEOWNER KNOWLEDGE OF ALLEGED HOUSE DEFECTS

It is difficult to understand how the District Court could decide that neither Heinlein not Cernick had knowledge of the offending defects, how the District Court reached a conclusion that it was undisputed that Heinlein

knew of no defects (undisclosed adverse material facts) that were not contained in his Seller's Disclosures, and that copies of the disclosures were given to Greg Hall's agent, Donna Hall. This is not true. These statements by the District Court are simply not correct. These things are vigorously disputed as set forth herein above. Heinlein told Cernick that the oil boiler furnace did not work and had been disconnected. (Heinlein Deposition page 21.), Cernick knew that the furnace had leaked water in the house and that the furnace had been disconnected. (Cernick Deposition page 33.) Despite this knowledge, Cernick represented and advertised the home as having "oil fuel" and "hot water heat." She also represented and advertised the home having "new windows" and was "ready to live in." (MLS Listing - Deposition Exhibit 4, attached hereto as Exhibit A.) Cernick representations and advertising were patently false and misleading. Thus Cernick and Heinlein were both aware of the defects (adverse material facts).

Cernick was aware of the material and adverse defects in the home. She inspected the home before advertising it as having an oil furnace. She gave Donna Hall a copy of the MLS to give to Greg Hall. Only after Greg signed the contract, did she then claim that she knew all along the furnace did not work. Cernick also knew of the problems with the sewer and water. She knew of the leaks in the home. She provided a three page stapled

document for delivery to Greg Hall which did not reflect the inoperable furnace. She failed to provide the mold disclosure statement, yet she knew that it is foreseeable that when one has water leaks, mold will form.

Heinlein also told his sister Cernick that sewage had backed up in the basement of the home. (Heinlein Deposition page 30.) Cernick knew the sewer had backed up,that there was a plug put in the line and that somebody had roto-rootered the line. (Cernick Deposition page 35.) Neither Heinlein or Cernick disclosed these facts to Greg Hall. (Heinlein Deposition page 29.) The only thing Heinlein did to allegedly fix the sewer back-up was to rotor-rooter the drain, clean the concrete floor, and shampoo the carpets (Heinlein Deposition Transcript, Page 13, Lines 13-17) He did not disclose this sewage back-up (Heinlein Deposition Transcript, Page 29, Lines 18-21) and he says didn't disclose it because he thought it was the City's problem as per the following exchange with Cernick's lawyer in his deposition:

Pages 48, Lines 20-25 and 49, Lines 1-4

Q As far as the sewer issue was concerned, it sounds as though the reason why you didn't disclose it on your seller's disclosure statement was because you had a problem and you got it fixed? It wasn't problem anymore?

A. No. Really, I didn't disclose it because I felt it was the city's problem

and not mine. So I didn't feel that it was a problem with the property but the sewer main where the city is responsible. That's the way I felt.

Contrary to the District Court's conclusion that the "...sewer backup that had been repaired did not constitute knowledge of a faulty underground line..." [Page 8 of Order Granting Defendants' Motions for Summary Judgment], that is exactly what Heinlein thought (Heinlein Deposition Transcript, Pages 48, Lines 20-25 and 49, Lines 1-4). To think that, he had to have knowledge of a faulty sewer line. But either way, the simple fact is a sewage backup is an adverse material fact and an "important matter" within the meaning of *Mattingly v. First Bank of Lincoln* (1997), 285 Mont. 209, 219, 947 P.2d 66, 72. Heinlein did not disclose it. Cernick did not disclose it. It wasn't on either version of the Seller's Disclosures. No investigation was required to discern this adverse material fact. They knew. They are brother and sister. Their parents owned the house previously. They even discussed it with each other.

These adverse material facts are not in either version of the Seller's Disclosures (Deposition Exhibits 4 and 8). And that is the question, were there adverse material facts ("defects").

The Montana Supreme Court has addressed constructive fraud on many occasions. *Mattingly v. First Bank of Lincoln* (1997), 285 Mont. 209,

219, 947 P.2d 66, 72, supports the proposition that constructive fraud can be found when sellers of real property, by their words or conduct, create a false impression concerning "serious impairment *or other important matters* " (emphasis supplied) and fail to disclose the relevant facts. See also *Russell v. Russell* (1969), 152 Mont. 461, 452 P.2d 77 (issue of fraud was properly submitted to a jury where the seller of a bar/restaurant failed to inform the buyer that the plumbing system in the bar/restaurant needed to be fixed to meet Board of Health standards); *Poulsen v. Treasure State Industries, Inc.* (1981), 192 Mont. 69, 626 P.2d 822 (property seller was liable for fraud in failing to inform property buyer that the seller had been cited with pollution violations at the property); and *Moschelle v. Hulse*, 190 Mont. 532, 622 P.2d 155 (1980) (affirming a judgment allowing rescission of a contract for deed for the purchase of a tavern, where the seller had informed the buyer that the building was in good condition and that he had installed new wiring, but neglected to inform the buyer that the floor and foundation were rotted and that the new wiring had been installed more than thirty years before; and the seller had told the buyer that the building was connected to the city sewer system but neglected to add that the buyer would be responsible for maintaining 200 feet of 100-year-old pipe between the building and the city line). All of these cases support the proposition that

merely fixing a condition is not enough if a Buyer was left with a false impression of the property by the failure to disclose the material adverse facts.

VII.

CONCLUSION

For the reasons set forth above, the District Court erred in granting the Motions in Limine. It applied incorrect legal standards in determining whether Scott Curry could testify as an expert on mold issues and standards of care of real estate professional. He was qualified to give such testimony as stated with particularity in the Argument sections of this Brief. Similarly, the District Court applied incorrect legal standards to the testimony of Greg Hall. Montana Rules of Evidence 401, 701 and 704 all support Greg Hall's right to testify about his medical conditions vis a vis the mold in the house. The Order Re: Defendants' Motions in Limine must be reversed and this cause remanded to the District Court for further proceedings and trial.

In addition, the District Court's legal and factual rulings were in error with respect to the Summary Judgments granted. Summary Judgment is ***not proper*** where there are disputed issues of fact. *Brohman v. State of Montana, (1988),* 230 Mont. 198, 749 P.2d 67. Summary judgment is not a substitute for trial by jury, *Brohman, supra.* As shown by the somewhat

lengthy argument above, there were genuine issues of material fact to be tried. The District Court made numerous improper legal conclusions and contradictory findings to grant the summary judgments. The Order Granting Summary Judgment must be reversed and this cause remanded to the District Court for further proceedings and trial.

VII.

Certificate of Compliance with Rule 11, Mont.R.App.P.

I hereby certify that the foregoing brief exclusive of the exclusions of Rule 11(4)(d), Mont. R.App.P. is proportionately spaced, utilizes a Times New Roman 14 point typeface, and consists of 47 pages and 9,979 words according to the word processor's counting function.

Respectfully submitted this 16th day of July, 2010.

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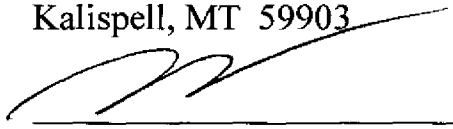

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